

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO SMITH,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 241585

Wayne Circuit Court

LC No. 01-009791

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree felony murder, MCL 750.316(1)(b). Defendant was sentenced to life in prison. We affirm.

Defendant's first issue on appeal is that the trial court denied defendant his due process right to present a defense by refusing to allow him to elicit testimony from witnesses in support of his theory of the case and by refusing to grant his request for an adjournment so that he could present an expert witness to discuss medical records turned over to the defense approximately one week before trial. We disagree.

We review claims of due process violations de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). We review the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

Defense counsel attempted to question the victim's mother concerning her employment and financial relationship with defendant. The prosecution objected, stating that the questions were not relevant. The trial court sustained the objections, stating, "I understand you have a theory, but I'm seeing that your theory is not relevant. So, it doesn't make any difference. I know what you're leading up to. It has nothing to do with the case anyway." It is unclear from the record the exact purpose of these questions. However, on appeal, defendant claims that he was attempting to support his theory that he cared for the victim and that the victim died from aspirating barium at the hospital rather than from being struck by defendant. Defendant now claims that he was unable to present his theory because the court would not let him question the victim's mother regarding her financial relationship with defendant. We disagree.

Defense counsel presented his theory in his opening statement and closing argument and in the questioning of numerous witnesses. Defense counsel engaged in the following dialogue with the victim's mother:

Q. Now, [defendant] has also assisted you on occasions in buying diapers or pampers for the baby, right?

A. No, I worked. I had a bridge card. No. He barely worked.

Defendant was able to elicit information regarding the victim's mother and defendant's financial relationship despite the earlier objection. Therefore, defendant has failed to show that the trial court's ruling denied him the right of due process. Defense counsel also had the opportunity to question the doctor at St. Johns who treated the victim before she died, and the forensic scientist who performed the victim's autopsy. Both the doctor and the forensic scientist concluded that the cause of death was blunt force trauma to the abdomen, rather than aspiration of barium. The trial court did not refuse to allow defendant to elicit testimony from witnesses in support of his theory of the case.

Next, defendant argues that the court erred in refusing to grant his request for an adjournment. Defendant requested an adjournment in order to present an expert to discuss medical records given to him five days before trial. As noted above, requests for adjournments are addressed to the trial court's discretion, and the decision will not be overturned absent an abuse of discretion resulting in prejudice to the accused. *People v Bell*, 155 Mich App 408, 412-413; 399 NW2d 542 (1986). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). Adjournments in criminal cases are not to be granted except for good cause shown. MCL 768.2. In reviewing this issue, we must consider (1) whether defendant is asserting a constitutional right, (2) whether there is a legitimate reason for asserting the right, (3) whether defendant is guilty of negligence, (4) whether adjournments were at defendant's behest, and (5) whether prejudice to defendant will result. *Bell, supra* at 413.

Defendant received new medical records approximately one week before the trial was scheduled to begin, indicating that the victim had aspirated some barium at the hospital. Dr. Witkowski, the pediatric care physician who treated the victim at St. Johns, testified that the victim was given barium in order to perform a CAT scan on her. On the way to the procedure, Dr. Witkowski noticed that the victim had aspirated a small amount of barium. Dr. Witkowski immediately suctioned the barium from the victim's mouth and nose and replaced the tube containing the barium with a new tube. Shortly after the CAT scan was performed, the victim passed away. Dr. Witkowski determined that the cause of death was severe injury to the chest and abdomen. Dr. Witkowski opined that barium had nothing to do with the victim's death. On cross-examination, Dr. Witkowski mentioned that aspiration was common in young children, but that it was not fatal. Dr. Witkowski also indicated that trace amounts of barium were found in the victim's lungs, which was expected, but that the victim's earlier x-rays revealed consolidation in her lungs due to some type of trauma to the lung.

Wayne County Medical Examiner Kelly Mills performed an autopsy on the victim. Mills found two small contusions, one on the victim's left upper chest, and one on her left upper

abdomen. Mills also found multiple tears to the liver with blood in the abdominal cavity. Mills indicated that the victim's right adrenal gland was completely torn in half and that there were bruises to both of her lungs on both sides. Mills examined the victim's respiratory system, indicating that there were no traces of barium found. Mills, however, did find a build up of blood in the vessels of the lungs and bruising to the lung tissue. On cross-examination, Mills testified that there would need to be a substantial amount of barium in the airway in order to cause asphyxia, which there was none in the victim's case. Mills also determined that the cause of death was blunt force trauma to the abdomen.

Defendant sought to present an expert to discuss the affects of barium on the lungs, but indicated that the expert would not be available until Friday. The court stated that the expert should be brought in that same day or the next day, but that the case was not going to be adjourned until that Friday. The court reasoned that, since the trial had been scheduled three months ago, defense counsel had ample time to prepare its defense and that witnesses could come in at the court's convenience. Defense counsel requested an adjournment, which the court denied.

Because adjournments are not to be granted except for good cause shown, we must consider whether good cause existed to grant defendant's request for an adjournment. Here, defendant was asserting his constitutional right to present a defense. Defendant claims that he was prejudiced because he was denied the opportunity to present an expert witness. However, we conclude that defendant was not denied the opportunity to present an expert witness, and even if he was, he was not prejudiced by the expert's absence at trial. The trial court stated that defense counsel had until the next day to present his expert witness. The court also noted that defense counsel listed a number of expert witnesses on his witness list, but failed to present them at trial. Defendant claims that the presentation of an expert was crucial to his defense, but he provides no basis from the record to substantiate his claim. Defendant cites no trial testimony that would have been contradicted by his expert, or testimony of prosecution witnesses which defense counsel would have more effectively cross-examined based upon his expert's assistance. Defense counsel merely stated that his expert was going to testify regarding the affects of barium on the lungs. However, two expert witnesses, which defendant had the opportunity to cross-examine, had already testified that only trace amounts of barium were found in the victim's lungs. Defendant has failed to show that his expert would have corroborated his theory that the victim died from aspirating barium. Defendant has failed to show a good cause for granting his adjournment. Therefore, the trial court did not abuse its discretion in denying defendant's request for an adjournment.

Defendant's second argument on appeal is that he was denied his right to a fair trial due to the trial court's failure to remedy the prosecution's misconduct, where the prosecutor improperly withheld medical records. We disagree.

To the extent defendant claims that his right to due process was violated by the prosecutor's failure to disclose exculpatory evidence, defendant presents a constitutional question subject to de novo review. *Cain, supra* at 108; *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998).

"A criminal defendant has a due process right of access to certain information possessed by the prosecution." *Lester, supra* at 281, citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194;

10 L Ed 2d 215 (1963). Due process requires disclosure of evidence that may lead a jury to entertain a reasonable doubt about a defendant's guilt. *Lester, supra* at 281, citing *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra* at 87.

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester, supra* at 281-282 (citations omitted).]

Here, defense counsel did not receive the victim's medical records from Riverview and St. John's Hospitals until approximately one week before trial. The prosecution claims that, as soon as it received the medical records from the hospitals, it turned them over to defendant. There was no showing on the record that the prosecution withheld evidence from defendant. There were no accusations that the prosecution withheld evidence, nor did defense counsel ask the trial court to address the prosecution's alleged misconduct. Defense counsel merely stated, "we only got the medical records last week" and "it wasn't our fault we didn't get the records until Friday." We conclude that the trial court did not err in failing to punish the prosecution for the alleged misconduct. Moreover, defendant was aware that the victim had been treated at both hospitals and could have requested the medical records himself. Even if defendant could prove that the prosecution withheld these medical records, defendant still fails to show that, if the evidence would have been disclosed to him, a reasonable probability existed that the outcome of the proceedings would have been different. The records merely indicate that the victim had aspirated a small amount of barium. There was nothing in the records indicating that barium was the cause of the victim's death. Defendant has failed to show that the prosecution withheld material records from defendant. Therefore, the trial court did not err in failing to sanction the prosecution for the alleged misconduct.

Defendant's third issue on appeal is that he was denied his right to a fair trial because the trial court displayed bias against him. We disagree.

Defendant first argues that the trial court displayed bias against him by refusing to allow the defense to respond to relevancy objections. However, according to MCL 768.29 and MCR 6.414(A), it is the duty of the trial judge to control all proceedings during the trial and to limit the introduction of evidence and the argument of counsel to relevant and material matters. Here, defense counsel attempted to question the victim's mother regarding her financial relationship with defendant, which presumably had nothing to do with the issue in the case, which is the cause of the victim's death. Sustaining this objection was neither improper nor partial to the prosecution. Defense counsel also attempted to question defendant's mother about how much time the victim's mother spent at defendant's home. This was also objected to, and sustained, as irrelevant. This ruling was also proper in that the information sought had nothing to do with the cause of the victim's death. The trial judge's refusal to allow defense counsel to question

witnesses regarding irrelevant issues fulfilled his duty to control the proceedings, did not pierce the veil of judicial impartiality, and did not deny defendant a fair trial.

Next, defendant claims that the trial court spoke to defense counsel with sarcasm, referencing a particular portion of the record. Even if the trial court's comments did rise to the level of sarcasm, defendant has failed to demonstrate any prejudice. The cited conversation took place before the jury entered the courtroom. Because the jury was not present during this conversation, it could not have influenced its decision. Because the trial court did not err in sustaining relevancy objections and because the alleged sarcastic comments made by the trial court to defense counsel occurred outside the jury's presence, defendant is not entitled to reversal.

Defendant's fourth issue on appeal is that he was denied his right to due process because the trial judge conducted his *Walker*¹ hearing without her glasses and could not see the witnesses. We disagree.

At a *Walker* hearing, the trial court sits as the trier of fact. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Therefore, when confronted with a conflict in the testimony, it is the court's duty to determine the credibility of the witnesses and arrive at its decision of whom to believe. *Id.* This Court has stated that the sole purpose of a *Walker* hearing is to determine the fact of voluntariness and a reviewing court is concerned only with the correctness of that determination. *People v Shelson*, 150 Mich App 718, 724; 389 NW2d 159 (1986).

In the instant case, there is nothing in the record to indicate that the trial judge's ruling regarding the voluntariness of defendant's statements was affected by her failure to wear her glasses. Defendant cites to the following dialogue in the *Walker* hearing transcript:

Court: So that picture was taken before you gave the statement to this officer over here, indicating Officer Bruce?

A. Officer Who?

Prosecution: No, that's not Bruce.

Court: Who is that? I can't see. I don't have my glasses.

A. That is the –

Court: The first one - the first person that testified.

Defendant, however, fails to state how he was specifically prejudiced by the judge's inability to see from a distance. There is nothing in the record indicating that the judge could not see the witness who was testifying, nor is there any indication that she could not see the pictures submitted of defendant after he was allegedly beaten by the police. Because defendant has failed

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

to show how he was prejudiced by the judge's failure to wear her glasses at the *Walker* hearing, we find no basis for reversal.

Defendant's fifth issue on appeal is that he was denied his right to a fair trial and impartial jury due to outside influences on the jury. Specifically, defendant claims that an emotional outburst by the victim's mother in front of the jury, and the display of the victim's photograph to the jury by the victim's family, influenced the jury in such a way as to render it biased toward the prosecution. We disagree. Defendant's claim that he was denied a fair and impartial jury raises a constitutional issue subject to de novo review. *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002).

According to Michigan case law, due process does not require that the jurors be shielded from every contact or influence that may affect their vote; rather, it requires that the jury be capable of deciding the case solely on the evidence before it. *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997). Our review of the entire record, including the incidents of which defendant complains, do not lead us to the conclusion that defendant was denied his right to a fair trial and impartial jury. Additionally, we conclude that there was overwhelming evidence of defendant's guilt in this case, on which the jury could base its guilty verdict. The cause of the victim's death was blunt force trauma to the abdomen. Defendant admitted to spanking the victim rather hard, more than once, on her side toward her stomach, within hours of her death. After this spanking occurred, defendant took the victim to see her mother in the triage unit, where the victim's mother noticed that the victim was crying, wheezing, and making funny noises. When defendant notified the security guard that the victim was not breathing, he indicated that he did not know what was wrong with the victim and failed to mention that he had just spanked her numerous times. When the police officers went to defendant's house to arrest him, he fled from the officers. It was not the photograph of the victim or the outburst by the victim's mother that influenced the jury to find defendant guilty. It was the testimony of the victim's mother, the doctor, the medical examiner, and mostly, it was defendant's own confession that he hit the victim on the side, numerous times, rather hard just before Juana passed away.

Furthermore, the trial court took precautionary measures to ensure that these outside events did not influence the jury. Immediately after the outburst by the victim's mother, the trial court had the jury exit the room and had the victim's mother escorted into the hallway. After the display of the victim's photograph, the judge instructed the victim's family to refrain from displaying the photograph, which they did. The trial judge even indicated that, during the display of the photograph, the jurors were concentrating on the witness testifying, not the photograph.

Even if these outside influences did affect the jury in some way, the trial court's instructions to the jury before deliberations were sufficient to correct any harm done. Specifically, the trial court stated to the jury:

Now, your duty is to decide the facts in the case It is your function to decide the facts based on the evidence that you have heard from the witness stand. Now, you must do so impartially, and without emotion, without bias or prejudice. But just make a finding based on the facts that you have heard.

Based on the above reasons, defendant was not denied his right to a fair trial and impartial jury.

Defendant's sixth issue on appeal is that statements made by the prosecution in its opening statement characterizing defendant as a monster denied him of his right to a fair trial. We disagree.

The record is unclear with respect to whether defendant objected to the alleged instance of prosecutorial misconduct. We shall treat it as preserved.

The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001). Further, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* However, appeals to the jury for sympathy constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

We conclude that, assuming the isolated "monster" reference constituted improper conduct on the part of the prosecutor, defendant was not prejudiced in light of the overwhelming evidence presented at trial of defendant's guilt.

Affirmed.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff